

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of	:	
	:	
Review of the Section 251 Unbundling	:	CC Docket No. 01-338
Obligations of Incumbent Local Exchange	:	
Carriers	:	
	:	
Implementation of the Local Competition	:	CC Docket No. 96-98
Provisions of the Telecommunications Act of	:	
1996	:	
	:	
Deployment of Wireline Services Offering	:	CC Docket No. 98-147
Advanced Telecommunications Capability	:	

Comment of
Commissioner Aaron Wilson, Jr. of the
Pennsylvania Public Utility Commission

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INTRODUCTION

On December 20, 2001, the Federal Communications Commission (Commission) released a Notice of Proposed Rulemaking initiating its first triennial review of its policies regarding unbundled network elements (UNEs).¹ This *NPRM* is one of several proceedings initiated by the Commission that mark the beginning of Phase II of the Commission's local competition and enforcement efforts under the Telecommunications Act of 1996 (TA-96).² With its triennial review, the Commission seeks to ensure that its regulatory framework remains current and faithful to the pro-competitive, market-opening provisions of TA-96, in light of the recent regulatory, technological, and marketplace developments in the telecommunications industry.³

¹ An incumbent local exchange carrier (ILEC) must make parts of its telephone network available to competing carriers, nationally, on an unbundled basis. See 47 U.S.C. §§251(c)(3), 251(d)(2). These network elements include: (1) loops (including dark fiber); (2) subloops; (3) network interface devices; (4) local circuit switching; (5) interoffice transmission facilities (including dark fiber); (6) signaling networks and call-related databases; and (7) operations support systems. *Implementation of the Local Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3771-3890, paras. 162-437 (1999)(*UNE Remand Order*). The Commission has also added the high frequency portion of the loop to this list of UNEs that an ILEC must offer. *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Provisions of the Telecommunications Act of 1996*, Third Report and Order at CC Docket No. 98-147 and Fourth Report and Order at CC Docket No. 96-98, 14 FCC Rcd 20912 (1999). In addition, the *UNE Remand Order* established that the Commission would revisit its unbundling rules every three years. *UNE Remand Order*, 15 FCC Rcd at 3766, para. 151 & n. 269.

² The FCC has also sought comment on a discrete set of national performance standards that could improve enforcement of an ILEC's wholesale obligations under TA-96. See *Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, et al., Notice of Proposed Rulemaking, CC Docket No. 01-318, FCC No. 01-331 (rel. November 19, 2001); See *Performance Measurements and Standards for Interstate Special Access Services*, et al., Notice of Proposed Rulemaking, CC Docket No. 01-321, FCC No. 01-339 (rel. November 19, 2001). The FCC also seeks comment on the proper regulatory treatment of ILEC broadband services. See *Development of Regulatory Framework for Incumbent LEC Broadband Services*, Notice of Proposed Rulemaking, CC Docket No. 01-337, FCC No. 01-360 (rel. December 20, 2001).

³ *NPRM* at para. 1.

Generally, the Commission requests comment on numerous aspects of its unbundling framework, including:

- The application of the “necessary” and “impair” standards,⁴ as well as whether and how the FCC should take into account other goals of TA-96, such as encouraging broadband deployment, investment in facilities, and technological innovation.
- A more targeted approach to defining specific network elements, such as whether or not the unbundling rules should vary by type of service, geography, or other factors.
- The proper role of state commissions in the implementation of unbundling requirements for ILECs.

Specifically, with respect to state commissions, the Commission seeks comment on the extent to which state commissions can act in creating, removing, and implementing unbundling requirements and the statutory provisions that would provide authority for states to act, consistent with applicable limitations on delegations of authority to the states.⁵ The Commission asks whether it should establish national standards that states would apply to ILEC networks or, alternatively, whether states are better situated to tailor unbundling rules that more precisely fit their markets.⁶

The Commission also inquires as to whether the development of federal unbundling rules should rely on any federal performance standards that may be established in the UNE and Special Access performance measures and standards proceedings. The Commission asks whether it should rely on an ILEC’s consistent

⁴ In determining what network elements should be made available, the Commission must consider, at a minimum, whether access to such network elements is necessary and whether the failure to provide such network access would impair the ability of a telecommunications carrier to provide the services it seeks to offer. 47 U.S.C. §251(d)(2)(A),(B). The stricter “necessary” standard applies to proprietary network elements. The “impair” standard applies to non-proprietary network elements. *UNE Remand Order* at paras. 29 & 31.

⁵ *NPRM* at para. 75.

⁶ *Id.* at para. 76.

compliance with a performance standard for a particular UNE in a state as a factor for delisting the element in that state. Finally, the Commission seeks comment on its proposal to convene a Federal-State Joint Conference to coordinate its UNE review pursuant to section 410(b) of TA-96.⁷

In these comments, Commissioner Wilson addresses the proper role of the state commissions in the implementation of ILEC unbundling requirements. First, the Commission should identify a minimum set of network elements that is more technologically neutral than the current approach. This approach should also permit the states to add to the list using their independent state law. Second, the development of federal unbundling standards should not rely on any federal UNE or Special Access performance standards that may be established. States should be able to develop their own performance standards in light of their own experience.

DISCUSSION

Our PaPUC recognizes that non-discriminatory access to UNEs is a critical component of a successful local telephone competition regime. As the Commission has noted, “the ability of requesting carriers to use unbundled network elements . . . is

⁷ *Id.* The Commission is authorized to confer with any State commission having regulatory jurisdiction with respect to carriers regarding the relationship between rate structures, accounts, charges, practices, classifications, and regulations of carriers subject to the jurisdiction of such State commissions and of the Commission. 47 U.S.C. §410(b). The PaPUC reminds the Commission, however, that actions taken after conferring with a state under Section 410(b) should not be confused with the joint jurisdiction under Section 706(a) and (b), which position the PaPUC has consistently maintained, and that the Commission cannot provide forbearance relief regarding UNEs without the exercise of joint jurisdiction with the states. See Comments of the PaPUC, CC Docket Nos. 98-11, 98-26, 98-32, and 97-6. In this *NPRM*, the Commission seeks comment on a proposal to convene a Federal-State Joint Conference to inform and coordinate its triennial UNE review. See *Petition of the Competitive Telecommunications Association, in Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed November 26, 2001). The PaPUC agrees that it may be advantageous for the Commission to establish some kind of formal mechanism to secure state participation in the application of the “impair” standard under section 251(d)(2), especially when considering the on-going nature of the triennial review and the state regulators’ experiences with and perspectives on the current UNE regime. However, without more detailed information on the specifics of the Federal-State Joint

integral to achieving Congress' objective of promoting rapid competition to all consumers in the local telecommunications market.”⁸ As the PAPUC has noted, non-discriminatory access to UNEs is essential if telephone competition is to spread throughout all parts of Pennsylvania. To move telephone competition beyond large business customers located in urban areas where new entrants have built their facilities, new entrants into the local telephone market “need to be able to lease the piece parts of the BA-PA’s⁹ ubiquitous network under non-discriminatory rates, terms, and conditions.”¹⁰

I. The Commission must develop a comprehensive approach to UNE unbundling requirements that is more technology neutral than the current limited focus on UNEs for telecommunications using landline technologies under the TA-96.

The unbundling of network elements is a necessary prerequisite to competition. However, this NPRM may cause problems because it focuses solely on the UNE requirements for telecommunications provided with landline technology. This NPRM and current Commission pronouncements have not comprehensively applied the TA-96 UNE requirements to telecommunications without regard to technology so as to include wireless, cable, and satellite. The Commission should seriously examine the appropriateness of requiring network unbundling regardless of technology in order to comply with the technology-neutral expectations and spirit in the TA-96. This is necessary in order to avoid creating an capital divide in which one carrier’s capital

Conference and how it would operate, the PAPUC is reluctant to formally support CompTel’s proposal at this time although it may be a way to comply with the conference requirement of Section 410(b)

⁸ *UNE Remand Order* at para. 5.

⁹ *Bell Atlantic Pennsylvania, Inc.*, n/k/a *Verizon Pennsylvania Inc.*

¹⁰ *Joint Petition of Nextlink Pennsylvania, Inc. et al.*, and *Joint Petition of Bell Atlantic Pennsylvania, Inc. et al.*, Docket Nos. P-00991648 and P-00991649 (order entered September 30, 1999)(*Global Order*) at 63. The PAPUC initiated the *Global* proceeding to resolve numerous outstanding telecommunications proceedings stemming from Chapter 30 and the TA-96 and to bring local competition to all Pennsylvania citizens.

investors are straddled with unbundling requirements while another competitor's capital investors are not. The continuation of a technology-specific approach to UNE requirements could ultimately create a dual patchwork of private and public systems wherein the costs and responsibilities of unbundling are imposed on some public telecommunications providers, such as incumbent RBOCs using landline technology, while those same responsibilities and costs are avoided for private telecommunications providers solely because of the cable, satellite, and wireless technology they choose to deploy. Such a regime of disparate unbundling requirements will create public and private networks, place unacceptable strain on the current public switched network, and create telecommunications infrastructure more the result of regulatory action as opposed to market and technological realities.

II. The Commission should continue to identify a minimum set of network elements that must be unbundled on a national basis, while states should continue with the authority to add to the list using their independent state law.

A minimum set of network elements must be unbundled on a national basis to the extent they are related to clear interstate considerations, do not replace or preempt state-mandated UNEs in pursuit of a state's intrastate law or procompetitive policy, and are imposed on a technologically neutral basis. This approach furthers the statutory purpose and design of section 251(d)(2) to provide competitive carriers with access to unbundled network elements that allows them to provide the services those carriers seek to offer. To that end, a national minimum list of UNEs provides competing carriers with certainty regarding the availability of these network elements.¹¹ This certainty is significant, especially when considering that the leasing of network elements continues to play a pivotal role in the entry of competing carriers into the local telephone markets in Pennsylvania.

¹¹ *UNE Remand Order* at para. 125.

The continuation of national minimum UNE requirements clearly related to the Commission's interstate authority, and that do not displace existing state UNE or tariffing approaches, helps sustain this mode of entry at the interstate level. Moreover, the Commission should expressly authorize the states' ability to add network elements to a list that does not pre-empt any state's own UNE law and policy.. Such authority allows an individual state to tailor its UNE requirements to the needs of that particular state and to address state-specific issues, including those of a technical, demographic, economic or basic geographic nature that are beyond the expertise of any one national regulatory significantly removed from those considerations.

Pennsylvania has authority under both federal and state law to add to the national minimum UNE list. In the *UNE Remand Order*, the Commission interpreted section 251(d)(3) of TA-96¹² to grant authority to state commissions to impose additional obligations upon ILECs so long as the additional obligations met the requirements of section 251 and the national policy framework instituted in that order.¹³ There is no reason to depart from the Commission's policy regarding a state's ability to modify the national list of UNE obligations as set forth in the *UNE Remand Order*.

The Commission's minimum national list, in addition to permitting other state-mandated UNEs, must not pre-empt a state from requiring the delivery of additional network components or services. States should be expressly permitted and encouraged to do that under independent state law so long as those additional network components or services are tariffed, available to all carriers, and meet a credible imputation test.¹⁴

¹² Section 251(d)(3) permits state commissions to establish access obligations that are consistent with the Commission's unbundling rules. Section 251(d)(3) specifically states that "in prescribing and enforcing regulations . . . , the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section and purposes of this part; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part." 47 U.S.C. §251(d)(3).

¹³ *UNE Remand Order* at para. 154. However, the Commission also found that state-by-state removal of elements from the national list was not consistent with the requirements and purposes of TA-96. *Id.*

¹⁴ In my experience with the PaPUC's network modernization policies, some network components or services, while they may not be mandated as UNEs under TA-96 or Chapter 30 because they have not come within

Furthermore, Pennsylvania's *Global Order* established the authority to impose additional UNE obligations or require the delivery of additional network components or services at tariffed rates under "Chapter 30" of its Public Utility Code.¹⁵ Chapter 30 requires a LEC to "unbundle each basic service function on which those competitive service depend . . ."¹⁶ Thus, to the extent that a LEC receives and accepts competitive classification of its business services, the LEC must unbundle the "basic service functions"¹⁷ on which the "competitive" local service depends. In the *Global Order*, the PAPUC noted that Verizon's Centrex, Paging, Repeat Dialing, Speed Dialing, and High Capacity Special Access services had been declared competitive in Pennsylvania. Therefore, any basic service functions used to provide those services were ordered to be unbundled.¹⁸ Since that time, network components or services have arisen that, while they might not be the subject of a UNE requirement, might better facilitate competition and network modernization, and attract the capital necessary for investment in such facilities and services, if they were available at tariffed rates as a matter of independent state law. The Commission should seriously consider endorsing such an approach for any network component or service it does not currently view as meeting the necessary and impair test under the TA-96.

the "necessary or impair" requirements of TA-96, might still be desired because they can facilitate network modernization or the delivery of desired services. Those network components or any resulting services can be encouraged under tariffed rates as a matter of independent state law. The FCC's NPRM should not be solely confined to the UNE requirements for landline technologies and should expressly encourage use of tariffed components or services, as a matter of independent state law, in those situations where a UNE may be inappropriate.

¹⁵ In 1993, the Pennsylvania General Assembly amended the Public Utility Code by adding "Chapter 30," 66 Pa. C.S. §§ 3001-3009, which introduced competition in the provision of telecommunications services and flexibility in terms of pricing and profits. Chapter 30 was adopted to promote lower prices, improved service quality, and the deployment of an advanced telecommunications network in pursuit of economic growth throughout all of Pennsylvania. See 66 Pa. C.S. §3001.

¹⁶ 66 Pa. C.S. §3005(e)(1).

¹⁷ Chapter 30 defines "basic service functions" as "those basic components of the local exchange carrier network which are necessary to provide a telecommunications service and which represent the smallest feasible level of unbundling capability of being tariffed and offered as a service." 66 Pa. C.S. §3002.

III. The development of federal unbundling standards should not rely exclusively on any federal UNE or special access performance standards that may be established.

The resulting federal unbundling rules should not mandate the de-listing of any UNE at the federal level and then subsequently impose that requirement on a state regardless of that state's experience. The Commission should give regulatory credence to the often-cited expertise of the states and not displace a state's specific experience in favor of a generalized national approach. Moreover, a permissive delisting approach to the states allows the Commission to promulgate a general perspective while not depriving a state of their autonomy, experience, or reliance on a previously known and certain package of UNEs.

CONCLUSION

These comments are provided on the proper role of the state commissions in the implementation of ILEC unbundling requirements. First, the Commission should continue to identify a minimum set of network elements that must be unbundled on a national basis, while continuing to allow states to add to the list.

Second, the Commission's approach to a minimum set of national network elements should be developed on a more technologically neutral basis than is the case under the current approach. Third, states such as Pennsylvania, which have authority under federal and state law, should be expressly encouraged and permitted to supplement this national minimum list by permitting the availability as a separate state UNE or a tariffed network component or service so long as the component or service passes an imputation test.

Finally, federal unbundling rules should bear no relationship to any federal UNE or Special Access performance standards that may be established. States should be

¹⁸ *Global Order* at 67-68. The PAPUC noted that loops, switching, and transport were part of the

permitted to develop their own performance standards and those standards should not be replaced with a national standard that may not reflect any given state's experience or situation.

Respectfully submitted,

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